NO. 48885-0-II

COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

KEVIN SCHOENFELDER and EMILY SCHOENFELDER,
husband and wife, et al,

Respondents,

vs.

ROBERT LARSON and JENNIFER LARSON,
husband and wife,

Appellants,

vs.

DAVID KING and JANE DOE KING, et al,
Third Party Defendants.

BRIEF OF APPELLANTS

Timothy R. Gosselin,
WSBA #13730
Attorneys for Appellants

GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98402
Office: 253-627-0684

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I. NATURE OF THE CASE

This is a dispute between neighbors regarding a written easement signed in 1996 for a driveway that ran over defendants' property and served both Defendants' and Plaintiffs' properties. The case proceeded to a bench trial on three theories: (1) Plaintiff's wanted a prescriptive easement for areas in addition to the written easement, specifically turnouts from the easement road onto defendant's property to allow cars to pass one another without having to signal or back up; (2) Plaintiffs wanted the court to turn the 10 foot easement into a 15 foot easement by restricting the defendants from putting a fence no closer than 2½ feet from the easement's boundary so emergency vehicles could use the roadway (RP 1:109); (3) Plaintiffs wanted the court to apply the spite fence statute, RCW 7.40.030, to prevent defendant from placing a fence closer than 2½ feet from the easement's boundary. After a bench trial, the court accepted Plaintiff's first two theories and denied the third. Defendant appeals those two issues. There has been no cross appeal.[1]

Defendant contends that there was not sufficient evidence or a legal basis to establish either a prescriptive easement or to expand the express

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1. Significant parts of the testimony and evidence at trial pertained to Plaintiffs' spite fence claim. Plaintiffs presented evidence that Larson was using the threat of a fence along the easement road to coerce Plaintiffs into allowing Larson to build a different access road so Larson could better use their property. Larson disputed that contention. None of that evidence is relevant to the prescriptive easement or implied right claims. Since plaintiffs did not appeal the trial court's decision on the spite fence claim, none of that evidence is relevant to this appeal either.

easement.

II. STATEMENT OF THE CASE

Plaintiffs are four landowners who each own parcels of land to the south of defendants Larson near Gig Harbor: LePape, Schoenfelder, Watermeyer and Bergman. Plaintiffs and Larson access their parcels by a road that runs from north to south from a public road through two parcels of Larson's property. From Larson's property, the road passes through a gate on Plaintiff LePape's boundary that is narrower than the road. (RP 1:171, 183) The road runs across LePape's property, then through Plaintiff Schoenfelder's, then through Plaintiff Bergman's, and ends at Plaintiff Watermeyer's. (RP 1:57; 3:116-17) The layout is depicted on Exhibit 51A.[2] The road is about 1200 feet in total. (RP1:58) About 700 feet of it is on Larson's property. (RP1:58-59; 3:69)

Each of the plaintiffs bought their property at different times. LePape in 1968 (RP 1:188); Schoenfelder in 1986 (RP 1:53); Watermeyer in 1996 (RP 1:225), and Bergman in 2004 (2:115). The Kings, from whom the Larsons bought, began purchasing their property in 1953 (RP 3:67), and added to it through the 1960s.[3] (RP 4:4-5) Larson bought the King's property

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2. The pink area outlines defendant Larson's property. (RP 3:132)

3. Mr. and Mrs. King bought the property. They passed away in the late 1990's leaving the property to their four children. The children – John, Barbara, David and Patricia – testified at trial.

in 2015. (RP 4:2; Exhibit 29)

The road has existed for many years preceding any party's ownership. There has never been a maintenance agreement. (RP 2:13)

The road also existed for many years without a formal agreement creating it. (RP 1:228) That was corrected in 1996. In conjunction with the Watermeyers' purchase of their parcel from the Marrs, the bank financing their purchase discovered that the property did not have formal, legal access and required it. (RP 1:228; 3:37) At the time, Larson's property was owned by the Kings. The Suttons owned what would become the Bergman's property. (RP 2:116) Watermeyers were buying their parcel from the Marrs. Someone prepared the easement – who is unknown – and had it circulated. (RP 1:229) The Kings, the Suttons, the Marrs and the Schoenfelders all signed the easement. (Exhibit 10) LePape did not.[4] However, the parties stipulated at trial that the extent of LePape's rights were no greater than those granted under the written easement (RP 3:71, 127; 4:29), and that this easement superceded anything that came before. (RP 3:127-30)

The 1996 agreement created an express 10 foot easement, measured five feet on either side of the centerline of the existing roadway. It states, in

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4. In 1981 plaintiffs LePape executed a document entitled "Road Easement." That easement purports to locate and size the easement across the King's property. However, it was not signed by any members of the King family. Apparently, LePape had just drafted and recorded it herself. LePape believed her access rights were controlled by this easement. The court subsequently found it was not valid. (CP 670)

relevant part:

> all parties agree to grant to each other and to each other's heirs, assigns and successors in interest, a nonexclusive surface easement for ingress and egress on five (5) feet on each side of the centerline across the existing black topped road which crosses their respective properties.

(Exhibit 10 at 2) The easement does not mention either turnouts or fences. Plaintiffs repeatedly acknowledged they knew the easement was only ten feet wide. (RP 1:58; 2:156, 189; 3:34) Dr. Watermeyer was the only Plaintiff to testify regarding the purpose of the easement. He said it "allowed me to get to my house." (RP 3:35)

The testimony at trial was generally consistent. For their part, each of the plaintiffs testified to using the roadway for ingress and egress since they bought their property. (E.g., RP 1:69-70, 162-63; 2:117, 152, 161; 3:5) They testified that friends and others using the property also used the road, as well as delivery trucks. (RP 2:154) Each plaintiff testified that during their use they would occasionally encounter another vehicle going in the opposite direction. They presented testimony that the road was obviously not wide enough to accommodate two vehicles. (RP 1:59; 2:156, 189; 3:37, 107 ("Nobody dispute that it's obvious that two cars when they meet cannot pass."), 199) Each testified that, when they encountered another vehicle, they would pull off to the side of the road – or let the other driver pull off -- at one of the various spots where they claimed a prescriptive easement. (RP 1:59-

70, 164-71, 198, 205; 2:217-21, 153-54, 163-64; 3:4-12) Sometimes they would use the Kings' driveway. (RP 1:206) The spots were highlighted in Exhibit 23A.

None of the Plaintiffs knew that the Kings saw or actually knew Plaintiffs were using the turnouts. Plaintiffs never encountered the Kings or their children. (RP 1:111-12, 215; 2:140, 184; 3:15) Plaintiffs never talked to the Kings about using the turnouts. (RP 1:110, 124) The King parents are deceased, but the King children (Patricia, Barbara, John and David) testified they never encountered other vehicles on the driveway. (RP 3:177-80, 196, 207-08; 4:15) Their parents did not use turnouts. Instead, they would honk at the entrance to the road or at their driveway, wait for a response, and proceed only if it was clear. (RP 1:74; 3:177-78, 196-97)

Plaintiffs also testified that in the early 1990's someone put some rocks at two turnout areas. (RP 1:75-76; Exhibit 14) At most, the largest was the size of a soccer ball. (RP 3:19) Dr. Bergman testified that none impeded anybody from using the turnout areas. (RP 2:142) Dr. Watermeyer testified he still used the turnouts despite the rocks. (RP 3:48)

Plaintiff Dr. Schoenfelder testified that within a few days after the rocks appeared, he moved two of the rocks placed at largest of the turnouts (the so-called "meadow" turnout), one at each end. (RP 1-76) He testified he hoped the others would just disappear, but he did nothing to remove them.

(RP 1:118, 121). His wife Emily testified that she taught her kids how to drive around the rocks. (RP 1:172) Linda Watermeyer testified that she would just drive around the rocks. (RP 2:165) Over the next several years, the rocks were either pushed or sunk into the ground. (RP 1:121, 129, 173, 200) They were gone by 1999. (RP 2:173; 3:20)

None of the plaintiffs knew who put the rocks there or why. (RP 1:80, 121, 124, 184, 200) The only additional testimony on this point came from the King siblings. They speculated that if their father put them there it might have been because people were dumping garbage on the property. The following typifies their testimony:

> (From John King) Q: Do you know how they got there?
> A: No. I know that – I assume that my father had them put there, but I don't know." (CP 1115)
> (From Barbara King) Q. What' s your recollection of how the rocks came to be there?
> A. I actually don' t have any -- no one told me that they put the rocks there.
> Q. Okay.
> A. I just assumed they were put there by -- I would assume it would be either by maintenance staff or something, but it wouldn't be -- I never was told who was installing rocks on the road or anything like that.
> Q. Okay. So do you have any knowledge, one way or the other, what the purpose of the rocks was?
> A. My dad had always mentioned that there was dumping of like yard debris and things, and -- keeping the meadow area excessively moist and kind of soggy, and so he didn't like that.
>
> So I don' t know if that's relevant or not, but he never told me why the rocks were there. And he actually -- he just didn't discuss things like that. He might do something, but he

didn't tell me why he did anything. (CP 1121-22)

> (From David King) Q. So you think those rocks were placed there to stop someone from coming onto the property?
> A. Well, I don' t know for sure. He didn't talk to -- he didn't talk to me about placing these rocks there or --but he had been concerned about that this area -- anyway, to the left was just something that was used for horse trail, and then walking, and I think that -- I think that concerned him. (CP 1130)

Their testimony in person was even less certain. Barbara King testified that her father was in his 80's so she did not believe he put the rocks there. She speculated it might have been maintenance people. (RP3:183) David King testified he did not know who put the rocks there. (RP 3:197) He thought it might have been his father because people were dumping trash 50-60 feet off the road. (RP 3:197) John King testified he didn't know but assumed his father put them there. (RP3:209).

Noone testified they thought the rocks were put there because the Plaintiffs were using the area as a turnout. The Plaintiffs simply did not know. All of the Kings testified that they did not know the neighbors were using areas for turnout; they couldn't recall ever meeting another vehicle on the roadway. (RP 3:177-80, 196, 207-08; 4:17-18) However, all the Kings testified that even if they or their parents had known plaintiffs were using the turnouts, they would not have cared. (RP 3:185, 209; 4:21) In general, they considered this the neighborly thing to do. (RP 3:209)

This lawsuit arose when the Larson's bought the King's property.

During the process of buying the property, survey markers were placed that generally identified the boarder of the easement road. Plaintiffs believed Larson planned to place a fence along those lines. They contended the fence would impair their ability to use the turnouts and their ability to use the entire road easement.

Shortly before the easement boundaries were staked, Plaintiff Bergman had asked the Gig Harbor Fire Department to evaluate the driveway. (RP 2:123) After the driveway was staked, real estate agent Rob Mitchell also asked the fire department to evaluate the roadway. (RP 2:49) In a letter dated October 24, 2014, the Fire Marshal described the following conditions that would negatively impact the ability to provide emergency services:

> 1. Asphalt road surface that is deteriorated. This condition makes it questionable as to whether the roadway will safely support te imposed loads of our emergency vehicles.
> 2. 9 foot road that will limit emergency vehicle access of our Medic Units, Fire Engines, and Water Tenders during an emergency.
> 3. Gate pillars that are less than 16 feet wide. These will also limit emergency vehicle access.

Exhibit 38 at 1. The letter went on to say:

> Pierce County Code Title 17C.60.150.C2 requires a road width of 24 feet and Pierce County Code Title 17C.60.150.C3 requires an overhead clearance of 13 feet - 6 inches. The current conditions, on the driveway that serves these properties, do not meet these requirements. Because of this

> situation, Gig Harbor Fire and Medic will not be able to provide a timely response to an emergency at your address. In addition, the imposed loads of the responding emergency vehicles may cause damage to the driving surface and adjacent areas due to the narrow width of the roadway. If our emergency vehicles slip off of the paved portion of the driveway we will likely get stuck in the sub-standard shoulder of the driveway and block further emergency response. (During my October 23, 2014, site visit my staff vehicle was slipping on the driveway surface.)

Id. While the letter does not mention the impact of a fence along the boarder of the road, the Fire Chief testified that a fence would also limit emergency services because of the swing of the vehicle around corners. (RP 1:142) He testified that his department uses a guideline of 15 feet wide. (RP 1:144) He also testified, however, that he had never been down the driveway and could not say which corner(s) a fire truck could not navigate. (RP 1:151, 155) He also testified that his department services other properties with similar access restrictions (RP 1:148), and that services are not be prevented, just slowed. (RP 1:151) And, he testified that his department had concerns about the sufficiency of the road regardless of whether Larson built a fence. (RP 1:158; accord RP 2:84)

Noone testified that an emergency vehicle had ever had to navigate the driveway. Some large vehicles, like garbage trucks, did not use the driveway. (RP 2:119)

Dr. Watermeyer acknowledged that the only problem that would arise

if the easement was limited to 10 feet was access for emergency vehicles. (RP 3:38-40) That was Plaintiffs' only concern with putting a fence on the boarder of the easement. (RP 1:109) Dr. Watermeyer summed up the Plaintiffs' claim this way:

> Q. So you believe that the Court should restrict the fence to an area wider than the easement area that you have?
>
> A. Probably. I mean, that's an imperfect document that was originally created. (RP 3:41)

After hearing the evidence, the trial court found that Plaintiffs as a group had a prescriptive easement for turnouts at two locations. (CP 1448-49) Among other things, the court found Mr. King had placed rocks in these two areas "to block access" to the area (CP 1428 (FOF 19)), and that Dr. Schoenfelder and the others interfered with his efforts. The court also found that the 1996 easement was ambiguous because it was silent regarding the location of structures near the easement boarders. (CP 1430 (FOF 23)). It found that a fence or structure along the boarder of the road would materially interfere with the intended purpose of the 1996 easement, which is to provide ingress and egress, and would deprive plaintiffs of the full enjoyment of their easement. (CP 1430-31 (FOF 24-26))

The court concluded that plaintiffs had established the elements of a prescriptive easement to two turnout areas. (CP 146-47 (COL10-11)) With regard to fences, the court relied on an unpublished decision of the Tennessee

Court of Appeals to conclude that a fence along the boarder of the easement would materially interfere with the use of the easement. (CP 1434-35 (COL 6-7)) The court permanently enjoined Larsons' from erecting any structure within 2½ feet of the boarder.

III. ASSIGNMENTS OF ERROR

1. Defendants assign error to Findings of Fact 16, 19, 21, 22, 23, 24, 25, 26, 28, 29, and 31.

2. Defendants assign error to Conclusions of Law 5 through 15

The Findings of Fact and Conclusions of Law are attached hereto as Appendix 1.)

3. The trial court erred in entering judgment awarding a prescriptive easement.

4. The trial court erred in entering judgment restricting and enjoining Larson's ability to build a fence within 2½ feet of the boundary of the express and prescriptive easements.

IV. ISSUES

1. Did substantial evidence support the trial court's finding that Plaintiffs' use of the turnouts was adverse to the Kings and with the King's knowledge at a time when he they were able in law to assert and enforce their rights? (Assignments of error 1, 2 and 3)

2. Was the evidence sufficient to support the trial court's conclusion that Plaintiffs had overcome the presumption of permissive use, and had presented sufficient evidence to establish a prescriptive easement? (Assignments of error 1, 2 and 3)

3. Did the trial court have sufficient factual or legal basis for

expanding the 10 foot express easement to 15 feet by enjoining defendants from constructing a fence within 2½ feet of the 10 foot boundary of the express easement? (Assignments of error 1, 2 and 4)

V. ARGUMENT

1. Standard of Review

The claimant bears the burden of proving the elements of a prescriptive easement. *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015). Whether a claimant has established those elements as a mixed question of law and fact. *Id.* at 44.

A trial court's factual findings are reviewed for abuse of discretion; a trial court's "conclusion that the facts, as found, constitute a prescriptive easement" is reviewed de novo. *Id.*

2. The evidence did not support a prescriptive easement.

"Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons." *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 83, 123 P.2d 771 (1942). To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use

occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." *Id.* at 83, 85. Larson disputes that Plaintiffs established the last two elements.

The principles applicable to this case were set out in *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015). Courts generally interpret adverse use as meaning that the land use was without the landowner's permission. Initially, there is a presumption of permissive use. "[W]e start with the presumption that when someone enters onto another's land, the person does so with the true owner's permission and in subordination to the latter's title." 183 Wn.2d at 44, quoting *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942)). Pertinent here, the presumption applies to cases involving unenclosed land. *Id.*

A claimant may overcome the presumption, and establish adverse use with proof that: (1) the user was adverse and hostile to the rights of the owner, or (2) the owner has indicated by some act his admission that the claimant has a right of easement. *Gamboa* at 51-52. But, for a claimant to show that land use is "adverse and hostile to the rights of the owner" in this context, the claimant must put forth evidence that he or she interfered with the owner's use of the land in some manner. *Id.*

The trial court applied the presumption of permissive use here because it found that the turnout areas were unenclosed and undeveloped.

(CP 1437 (COL 11)). That finding has not been challenged. The court concluded the plaintiffs overcame the presumption of permissive use because they showed (1) that in placing the rocks in the turnout area, Mr. King "took a stance to block access to the turnout areas," and that Plaintiffs interfered with the Kings' use "through removal and relocation of the large rocks placed on the two turnout areas followed by continued use of the turnout areas to allow cars to pass on the road. *Id.* The Larsons maintain the trial court's findings are not supported by the evidence, and its conclusions are legally incorrect.

A. Facts critical to the trial court's conclusion that Plaintiffs proved a prescriptive easement are not supported by substantial evidence. The trial court erred by finding that Mr. King blocked access to the turnout areas as an assertion of the King's rights of ownership.

Findings of fact are reviewed under the substantial evidence standard. Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Speculation is not substantial evidence. *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007).

To support its conclusion that Plaintiffs use of the property was adverse to the Kings, the court made factual findings that Mr. King placed rocks into the turnout, and that by placing the rocks the Kings generally

intended to block access to the turnouts. (See, e.g., Findings of Fact 16, 19, 21, 22, 23) Larson respectfully contends that at least three parts of these findings are not supported by the evidence.

First, the trial court had to speculate to find that King placed the rocks at all. The testimony was unequivocal: Noone saw the King's place the rocks. Noone heard the Kings discuss placing the rocks. Noone knew where the rocks came from. The most that can be said is that the Kings owned the property where the rocks were placed, and witnesses assumed Mr. King or someone working for him had placed them.

Second, even if substantial evidence showed that the Kings placed the rocks, the court had to speculate to find a reason for doing so. The trial court found that the King siblings testified "that Mr. King had expressed concern about people trespassing on to the meadow area, which he watered and retained landscapers to mow." (CP 1427 (FOF 16)) It also found that by placing the rocks, Mr. King Sr. "took a stance to block access to these two turnout areas." (CP 1428 (FOF 19)). Based on this, the court found:

> Dr. Schoenfelder and others effectively interfered with Mr. King Sr.'s efforts to block access to the turnout areas and their actions to clear the turnout areas for continued use were adverse to and asserted as superior to Mr. King's rights as the owner of the property upon which the turnouts are located. Thereafter plaintiffs continued regular use of the two turnout areas to allow oncoming vehicles to pass, which actions, in light of the prior placement of the large rocks, were also adverse and asserted as superior to the rights of the Kings, as

> property owners. when it found that, by placing the rocks, Mr. King "took a stance to block access to these two turnouts." (CP 1428)

But, the most that Plaintiffs presented was testimony from the King children that Mr. King had concerns about people dumping garbage in the area and may have wanted to block them from doing that. The children readily admitted, however, they did not know if their parents placed the rocks or why.

There was no testimony Mr. King had a generalized desire to prevent trespassing or to stop anyone from accessing the turnouts. Noone testified that they saw the Kings place the rocks, or that the Kings ever said why they did it if they did. As barriers, the rocks were wholly inadequate. The largest was the size of a soccer ball. The two rocks that Dr. Schoenfelder moved, he moved himself. the others were driven over. The testimony was undisputed that the Kings themselves parked in the area behind the rocks. (RP 4:9, 13, 19-20, 24) Based on this evidence, it was as likely that the rocks were placed as decoration as it was that they were placed to block access to the turnouts.

Third, the court had to speculate when it found that the Kings' failure to respond when Schoenfelder moved the rocks and others drove over the rocks indicated their admission that the Plaintiffs had a right of easement. But there was no evidence the Kings were aware that two rocks had been moved or that the others were being driven over. There also was no evidence

that the Kings knew or had reason to know that Schoenfelder or any other plaintiff was doing it.

These findings were critical to the trial court's ultimate conclusion. They allowed the court to reason this way: Witnesses testified that Mr. King might have placed the rocks to prevent people from dumping garbage on his property. Stopping people from dumping garbage is preventing access to his property, therefore Mr. King wanted to prevent people from accessing his property. Plaintiffs are people. Therefore, Mr. King wanted to prevent Plaintiffs from accessing his property. Plaintiffs acted contrary to Mr. King's efforts. Therefore, Plaintiffs asserted superior rights to the Kings.

The fallacy of this reasoning is apparent. The fact that Mr. King might have wanted to block people from dumping garbage does not mean he wanted to block access to everyone in general, or plaintiffs in particular. If he did not intend to block the plaintiffs, then he would not interpret their actions as assertions of superior title, even if he knew of them. And, since there was no evidence the Kings knew who moved the rocks, he could not have acquiesced to the assertion of right by the Plaintiffs.

The trial court's conclusion that Plaintiffs had overcome the presumption of permissive use was based on its findings that Plaintiffs use of the turnouts was adverse to the Kings. It was adverse because the court found that the Kings placed the rocks to keep plaintiffs out of the turnout

areas then acquiesced to the rocks being moved or driven over. Because substantial evidence does not support these findings, Plaintiffs failed to meet their burden.

B. The facts, even if accepted as found, are not sufficient to overcome the presumption of permissive use and do not support a prescriptive easement.

Even if substantial evidence supported the trial court's findings, the findings do not establish adversity for purposes of a prescriptive easement. A use is adverse when the claimant "'uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use.'" *Drake v. Smersh*, 122 Wn. App. 147, 152, 89 P.3d 726 (2004) (quoting *Kunkel*, 106 Wn. App. at 602). "Use is not adverse if it is permissive." *Id.* The inference of permissive use applies when a court can reasonably infer the use was permitted by neighborly sufferance or acquiescence. *Gamboa v. Clark*, 183 Wn.2d at 44. Whether use is adverse is measured objectively by looking at the observable acts of the user and the rightful owner. *Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812 (1980); see also *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d at 88 (in determining whether use is adverse and whether a property owner had the requisite notice of the use, "the nature and location of the property involved are material and important considerations").

To overcome the presumption of permissive use, a claimant must

show that land use is "adverse and hostile to the rights of the owner" in a way that interfered with the owner's use of the land in some manner. *Gamboa* at 51-52. The claimant must show that the party being de-seized had knowledge of the adverse acts of the party asserting the right. *Cole v. Laverty*, 112 Wn. App. 180, 186, 49 P.3d 924 (2002). A claimant also must show that "the owner has indicated by some act his admission that the claimant has a right of easement." *Id.* In *Gamboa*, the court found that occasional blading of an access road did not interfere with the owner's use of the road. In *Imrie v. Kelley,* 160 Wn. App. 1, 10, 250 P2d 1045, *review denied,* 171 Wn.2d 1029 (2011), the court held that sharing the cost of graveling the road, and the owner asking for the user's consent before putting a lock on the gate, were not sufficient. In *Kunkel v. Fisher*, 106 Wn. App. 599, 23 P.3d 1128 (2001), the claimant established that (1) he used the road for the relevant time period, (2) successive owners were aware of the claimant's use, (3) no one ever objected, (4) the claimant brought and spread gravel on one occasion, and (5) the claimant had been assured that his use of the road was not a problem. That, too, was not enough to overcome the presumption of permissive use. In *Crites v. Koch,* 49 Wn. App. 171, 177-78, 741 P.2d 1005 (1987), the practice of farmers parking their equipment on their neighbors' fields demonstrated a neighborly courtesy, and the trial court's finding of a prescriptive easement was therefore reversed. In *Miller v. Jarman,* 2 Wn.

App. 994, 471 P.2d 704, *review denied,* 78 Wn.2d 995 (1970), the parties' reciprocal use of each other's driveway was found to support an inference of neighborly courtesy, and therefore permissive, not adverse, use.

Here, adversity was grounded on the barest of facts. The trial court concluded that this element was present based on Mr. King's placement of rocks and the inferences it drew from that fact.

In the context of all the facts, those are not sufficient to support adversity in this case. Even if the placement of rocks could be construed as an act of exclusion, as noted previously there was no evidence they were placed to exclude the Plaintiffs in particular. There also was no evidence the Kings saw Schoenfelder move or drive over the rocks, or any of the Plaintiffs use the turnouts after the rocks were placed. Thus, there was no way for the Kings to have known that Schoenfelder or any other Plaintiff was asserting a right superior to theirs. The absence of this evidence precludes a conclusion that Plaintiffs overcame the presumption of permissive use. See, e.g., *Gamboa v. Clark*, 183 Wn.2d at 43.

Moreover, the relationship and prior acts of the parties overwhelmingly point to neighborly acquiescence by all the parties. The use Plaintiffs made of the property was minor and unintrusive. It is no different than using a neighbor's driveway to turn a vehicle around. The relationship between the Kings and the other neighbors was friendly and neighborly. (RP

1:72; CP 1127) Despite that, none of the Plaintiffs ever told the Kings they were using the turnouts or claimed a directly right to do so. When the Bergmans needed to formalize the road easement, the Kings willingly agreed and cooperated without hesitation. Even though, by their own testimony, some of the plaintiffs had already been using the turnouts for years, none of the Plaintiffs raised the issue of the turnouts at the time of the written easement, nor suggested that turnouts be included in the written easement.[5] The King children testified that neither they nor their parents would have cared that the turnouts were being used.

This case is the prototype for why the presumption of permissive use applies. As the *Gamboa* court stated:

> "The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the landowner is called upon 'to go to law' to protect his rights."

183 Wn.2d at 48, quoting *Roediger v. Cullen*, 26 Wn.2d 690, 709, 175 P.2d 669 (1946).

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5. During the trial, Plaintiffs acknowledged that they knew – i.e., it was obvious – that two vehicles could not pass at the same time on the 10 foot roadway. Nevertheless, they made no effort to address that issue when they signed the written easement. Their arguments in this case suggest they simply planned to expand the express easement to take what they did not ask the Kings to expressly grant.

Plaintiffs momentarily pulled to the side of the road onto the King's property. Unlike placing a utility line or building a structure, one can hardly think of a more typical and innocuous use of a neighbor's land than to occasionally pull into a driveway or pull off to allow another vehicle to pass. Plaintiffs did not damage the property. They did not harm the Kings. They did not interfere with the King's use of the property. Neighborly acquiescence is exactly what the law would hope for in such circumstances.

3. Expansion of the express easement to prohibit structures within 2½ feet of the boundary was not supported by the law or facts.

By its terms, the express roadway easement is clear. The easement is 10 feet wide, five feet on each side of the center line. The easement is silent about the areas past those boundaries. It says nothing about what the servient estate may or may not do outside the property. The trial court interpreted that silence as an ambiguity regarding whether the owners of the servient estate could erect a fence along the easement boarder. The court erred in finding the easement ambiguous, and erred in expanding the easement to prevent the servient estate from erecting a fence within 2½ feet of the boundary.

In determining the scope of an easement that is created by express grant, the court looks to the language of the original grant to determine the permitted uses. *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Easements are to be strictly construed in accordance with their terms in an

effort to give effect to the intentions of the parties. *Sanders v. City of Seattle*, 160 Wn.2d 198, 214, 156 P.3d 874 (2007). A contract is ambiguous only when "fairly susceptible to two different interpretations, both of which are reasonable." *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005).

The court erred in deciding the easement was ambiguous. Failure of expression and ambiguity of expression are different things. An ambiguous provision is one fairly susceptible to two different, reasonable interpretations. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 116 P.3d 409 (Div. 2 2005). There is no ambiguity in this easement: It provided a 10 foot easement for ingress and egress. What the court was presented with was an omission. Where there is a material omission in a contract, it is the duty of the court to determine the intention of the parties by viewing the contract as a whole and considering all of the circumstances leading up to its execution, including the subject matter and the subsequent acts and conduct of the parties. *Kwik-Lok Corp. v. Pulse*, 41 Wn. App. 142, 702 P.2d 1226 (1985).

The court also erred by interpreting the easement according to Plaintiffs' claimed need, rather than the intent of the parties. Plaintiffs claimed that the easement had to include a restriction on the location of structures within 2½ feet or emergency vehicles could not get access to the property. But, many properties in our geographical area have no or limited

access for emergency vehicles. Homes are reached by tram or by boat or by stairs or, as here, by narrow driveways. Salmon Beach in Tacoma is illustrative. Emergency services to these kinds of properties must be brought in by boat or walked in over land. In fact, the fire chief who testified in this case acknowledged that his department services other properties with such restrictions. (RP 1:148) Thus, the simple fact that emergency services may have not have unfettered access to Plaintiffs' property if Larson erected a fence, should not have determined whether the Larsons could build a fence to the boarder of the easement. The question should have been what the parties intended. See *Visser v. Craig*, 139 Wn. App. 152, 160, 159 P.3d 453 (2007), citing *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986)(whether express easement that benefitted one parcel could be used to benefit another depends on intent of original parties).

Had the court looked to the intent of the parties, the evidence would have supported only once conclusion: There was no restriction on building to the boarder of the easement. First, the express wording of the easement supports that conclusion. It states clearly, the easement covers "five (5) feet on each side of the centerline across the existing black topped road ." The easement conveys no more than that.

The purpose of the easement does not alter that conclusion. By its terms, the easement was for ingress and egress. Plaintiffs' central premise is

that "reasonably included [in ingress and egress] is viable ingress and egress for emergency vehicles." (CP 755) The premise is incorrect. Washington courts have encountered all widths of ingress and egress easements, many that are less than the 15 feet Plaintiffs wanted here. See, e.g.,*Winsten v. Prichard*, 23 Wn. App. 428, 597 P.2d 415 (1979)(5 foot easement for ingress and egress); *Noble v. Safe Harbor Family Preservation Trust*, 141 Wn. App. 168, 171, 169 P.3d 45 (2007)(10-foot-wide ingress and egress easement); *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (2010)(10 foot by 131 foot easement for roadway access); *Griffin v. Draper*, 32 Wn. App. 611, 612, 649 P.2d 123 (1982)(10-foot prescriptive easement for ingress and egress). Obviously, a five foot ingress and egress easement would not accommodate cars – more likely a foot path or a stairway. A ten foot easement would not accommodate emergency vehicles. These easements illustrate that it is incorrect to infer that an ingress and egress easement necessarily implies access for large emergency vehicles. Rather, they allow only what the parties intended them to allow.

Here, just twenty years earlier, the parties negotiated for only a ten foot easement. Plaintiffs testified they knew when the written easement was created that the road allowed only limited access. They testified, for example that it was obvious the roadway was narrow and would only accommodate one vehicle at a time. (RP 1:59; 3:107 (by Plaintiffs' counsel: "Nobody

disputes that it's obvious that two cars when they meet cannot pass.")) They also knew that LePape had erected a gate that itself was narrower than the road. (RP 1:183) From this, one must infer that the Plaintiffs were aware of the rights they were getting and what they were not. They did not negotiate for a roadway wide enough to accommodate emergency vehicles. They negotiated for a driveway, and that is what they got.

The historical use of the road supports that conclusion. The only evidence presented was that the Plaintiffs used the roadway as any driveway would be used. They and friends drove personal vehicles over it. Occasionally, FedEx and UPS trucks would use the road to deliver packages. (RP 2:154) Plaintiffs presented no evidence that emergency vehicles like those that concerned the fire chief had ever accessed the property before or after the written easement was executed.

Beyond these points, Plaintiffs presented nothing indicating the easement was intended to restrict any area other than what it specifically identified. While their sole argument was that a fence would interfere with large emergency vehicles (RP 1:109; CP 755-56), they presented no evidence, for example that the parties ever discussed assuring that emergency vehicles had access. They presented no evidence that such emergency vehicles had ever used the road. They presented no evidence that the size of emergency vehicles had changed over the time of the easement so that the easement

needed to accommodate reasonable changes in use. Importantly, they presented no evidence that building to the boundary line would interfere with the ordinary use they had made of the roadway.

To the extent it had any bearing on the issue, Plaintiffs also could not show a need. Plaintiffs own testimony showed that Larson had offered to construct a new access road. (RP 2:27-30) In addition to benefitting Larson's use of their own property, the new road would have assured that emergency vehicles had quality access. (RP 2:82-83) Plaintiffs declined because the route was more cumbersome to them. In the end, not only was Larson unable to move the existing easement, the court expanded that easement to provide the benefits a new road would have provided. The court should not have allowed Plaintiffs to decline a change that would have addressed the requirements of emergency vehicles only to force a different change that took more of Larson's property.

In the same vein, Plaintiffs also could not show a unique need. The driveway created by the easement serves as the Larson's only access to their property, not just the Plaintiffs. Thus limitations on the use of the roadway burden the Larsons as much as Plaintiffs. Plaintiffs needs were no greater than the Larson's.

The court's decision was simply contrary to the evidence. The evidence showed that the parties intended to create a driveway, not a

commercial highway. Just as not every property has vehicular access, not every driveway can accommodate large emergency or commercial vehicles. The trial court had no basis for concluding that this driveway had to accommodate those vehicles.

The result also reflects bad policy. This driveway is no different than many other driveways created by easement. The size of emergency vehicles is constant. By engrafting into this easement the prohibition that, to accommodate emergency vehicles, the Larsons may not use 2½ feet more of their property than the easement covers, the trial court essentially decided that every existing driveway easement must have at least 15 feet of open space to accommodate emergency vehicles. The courts are not in a position to dictate such terms.

Moreover, if Plaintiffs truly had a need, they had a remedy. RCW 8. 24.010 allows landowners to obtain a private way of necessity for land's proper use and enjoyment. If Plaintiffs had done that, however, Plaintiffs would have had to pay the value of the property and the attorney's fees and expert fees of the property owner. RCW 8.24.030. The trial court's ruling relieved them of those obligations.

The unfairness of the result is easily illustrated. The Larson's testified that they wanted to fence their property so they could keep animals. Under the trial court's ruling they have to place their fence 2½ feet from the

easement road. This creates two strips of land outside the fence that are approximately 2½ feet by 700 feet. That totals approximately 3500 square feet of land. While there is no reasonable use for those lands, the Larson's still must pay the taxes. This explains why people typically do not build fences off their property lines: It creates wasted property. (See RP 2:95)

As support for its ruling, the trial court relied on an unpublished Tennessee Court of Appeals decision, *Carroll v. Belcher*, 1999 WL 58597 (Feb. 9, 1999) (CP 1434 (COL6)). That reliance was misplaced. In that case, the holder of the dominant estate asked the court to increase the width of an 8 to 10 foot wide ingress and egress easement to 15 feet to accommodate modern vehicles and emergency vehicles. The owner of the servient estate had erected a fence along the boarder of the easement. The evidence showed that the fence interfered with the servient estate owner's ability to drive on the easement. The appellate court refused to expand the easement to 15 feet, noting:

> To allow Carroll to expand the easement to fifteen feet, will, in effect, grant Carroll the right to take approximately 3000 square feet of Belcher's property. This appears to be an "unwarranted interference" with Belcher's rights, and as such, causes an undue burden upon him.

Id at 4. Nevertheless, without analysis, the court decided that some relief should be granted because "the terrain over which the easement runs is wooded and the easement is not straight," making it "somewhat difficult in

close quarters to drive a vehicle without striking the fence." *Id.* The court enjoined the servient estate from erecting a fence within two feet of the boundary. The net effect was to do exactly what the court had decided was improper: Take square footage from the servient estate.

The differences between *Carroll* and this case are significant. First, the easement in *Carroll* arose by use over time, not by an express agreement negotiated just twenty years earlier. This is important because, in the absence of a written description, the parties accommodated or acquiesced in changes to the use as vehicles and conditions changed. As the *Carroll* court noted it was a wagon road before being used for cars. *Id.* at 1. Here the easement is defined by the parties' written agreement and there was no evidence of a change in use since the parties made the agreement.

Second, in *Carroll*, there was testimony that the dominant estate could not use the easement for its historical purpose with the fence in place. Here, there was no evidence that a fence would impair Plaintiffs' use of the easement. Plaintiffs' theory was that the extra space was needed to allow emergency vehicles, not their vehicles, to access the property. (CP 755)

Third, *Carroll* simply does not reflect the law of Washington. Whether Plaintiffs' claim is viewed as seeking to expand the easement or seeking to limit Larson's ability to impair the easement, Washington has clearly established rules.

The rules for expansion are illustrated by *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003). There, the dominant estate had easements for irrigation laterals. The easements were granted in the early 1900's. The dominant estate wanted to widen the easements to accommodate new equipment that more effectively maintained the laterals. The issue addressed by the court was "Whether the easements on [the servient estate] grant the dominant estate the right to enlarge its right-of-way over time based upon future demands for irrigation and maintenance?" *Id.* at 879. The court answered the question by interpreting the easement.

> The intent of the original parties to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered. If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions.

Id. at 880. The court decided that the parties had intended to allow for expansion.

> We . . . hold that an easement can be expanded over time if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands. The face of the easement must manifest this clear intent. The four corners rule ensures subsequent purchasers have clear actual or constructive notice of the encumbrance based upon future demand. The easements on Dickie's properties grant "the right and permission to enter upon said land for the ... enlargement and repair of said ... laterals, ... and to ... maintain and repair the same...." We find that this language manifests a clear intent to enlarge the lateral

and its maintenance area based upon future demands.

Id. at 884.

The rules for impairment are illustrated by *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012). There the dominant estate had an express written easement for a 40 foot roadway to allow access and utility lines. The estate only used 12 to 14 feet of it. The owner of the servient estate built a fence that encroached into the 40 foot easement, but not the 12-14 foot area historically used. The servient estate sought to have the fence removed. To decide the case, the court applied rules of construction to the easement, deciding that the words of the easement, not the parties' historical use controlled. It also recognized that while the dominant estate may make any use of the easement consistent with its purpose, it could not use the easement in a way that could create a claim of adverse possession. The court reasoned that because the fence could allow the dominant estate to assert adverse possession over that part of the easement enclosed by the fence, the fence had to be removed.

> Schulze, as the servient owner, is entitled to enjoy the full use of his property, but he cannot build structures that although arguably not interfering with current easement use, would by adverse possession principles deny the easement owners their right to the future expanded easement use. It follows that a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to remove any structure that could deny the easement owner his full easement rights.

> . . . .
> [T]he easement here is regularly used for ingress, egress, and utilities, and Schulze's fence appears to be a permanent structure that could establish an adverse possession claim by Schulze; if so, Littlefair is entitled to have it removed to prevent loss of a major portion of the 40-foot easement.

169 Wn. App. at 667. Accord, *Visser v. Craig*, 139 Wn. App. 152, 159 P.3d 453 (2007)(an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant unless the grant, properly construed to give effect to the intent of the parties, allows it).

Both rules require the courts to look to the intent of the parties. Unlike the facts in *Sunnyside Valley Irr. Dist. v. Dickie*, here the easement manifests no intention to allow its area to be enlarged. And, here, unlike *Littlefair v. Schulze*, there was no evidence that the intended use of the area conveyed by the easement would be impaired. Nevertheless, the trial court ordered the Larsons to relinquish rights to use 3500 square feet of their property to accommodate an illusory need not contemplated just twenty years earlier when the parties agreed to the easement. Neither the evidence nor the law support that decision.

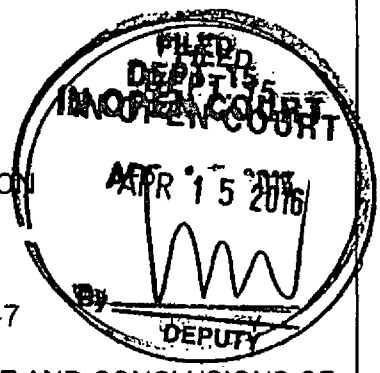
VI. CONCLUSION

For the foregoing reasons, the Larsons ask this court to reverse the trial court's judgment awarding a prescriptive easement to Plaintiffs and enjoining the Larsons from erecting a structure within 2½ feet of the boundary of the express easement.

Dated this 4th day of November, 2016.

TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Appellants

APPENDIX 1



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

KEVIN SCHOENFELDER and EMILY SCHOENFELDER, husband and wife; KENNETH BERGMAN and PAM BERGMAN, husband and wife; DERYCK S. WATERMEYER and LINDA L. WATERMEYER, as Trustees of the WATERMEYER LIVING TRUST; and MARILYN J. LEPAPE and JEANNE L. WIENER, as Trustees of the HARRY AND MARILYN LEPAPE SURVIVOR'S TRUST DATED 8/15/12,

Plaintiffs,

vs.

ROBERT LARSON and JENNIFER LARSON, husband and wife,

Defendants

ROBERT LARSON and JENNIFER LARSON, husband and wife,

Third Party Plaintiffs,

vs.

DAVID KING and JANE DOE KING, PATRICIA KING and JOHN DOE KING, BARBARA KING and JOHN DOE KING, and JOHN DOE and JANE DOE KING,

Third Party Defendants.

NO. 15-2-05773-7

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ASSIGNED TO THE HONORABLE GRETCHEN LEANDERSON

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

THIS MATTER came on regularly for trial before the Court, without a jury, on February 3, 4, 10 and 11, 2016. Plaintiffs Kevin and Emily Schoenfelder, Kenneth and Pam Bergman, Deryck and Linda Watermeyer, as Trustees for the Watermeyer Living Trust and Marilyn Lepape and Jeanne Wiener, as Trustees for Harry and Marilyn Lepape Survivor's Trust dated 8/15/12 all appeared by and through their attorney Margaret Archer of Gordon Thomas Honeywell, LLP. Defendants Robert and Jennifer Larson appeared by and through their attorney, Bart Adams of Adams and Adams, P.S. Third party defendants David King, Patricia King, Barbara King and John King appeared through their attorney James Tomlinson of Davies Pearson, P.C.

Only the claims asserted by plaintiffs against defendants Larson were litigated in this trial. Defendants Larsons' counterclaim was voluntarily dismissed pursuant and to an Order of Dismissal Without Prejudice entered by the Court on February 3, 2016. Pursuant to the Agreed Order Re: Third Party Plaintiffs and Third Party Defendants entered on February 3, 2016, claims asserted in this action by third party plaintiffs against third party defendants are bifurcated and will be decided by a separate trial. The primary issues presented in this trial were as follows:

1. Do the plaintiffs have a prescriptive easement on defendants Larson's property entitling them to use four turnout areas adjacent to their 10-foot express road easement for ingress and egress (identified and labeled A, B, Y and Z on Exhibit 3) and, if so, what is the scope of the prescriptive easement?

2. Does the scope of the plaintiffs' 10-foot express easement for ingress and egress preclude the erection of a fence that would interfere with the purpose of that easement and, if so, what distance or restrictions are to be made on a fence?

3. Did plaintiffs satisfy the elements of a spite fence claim under RCW 7.40.030 and, if so, what injunctive relief is appropriate?

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

The Court, having heard the testimony of the parties and witnesses presented, considered the evidence, and being fully advised in the premises, orally announced its ruling on February 17, 2016. Now, therefore, the Court makes the following Findings of Fact that were established by the preponderance of the direct and circumstantial evidence presented at trial, and Conclusions of Law, which Findings and Conclusions include and incorporate by reference the Court's previously announced oral ruling.

FINDINGS OF FACT

1. Plaintiffs Kevin and Emily Schoenfelder are husband and wife and own improved real property located at 10410 Kopachuck Drive NW in Gig Harbor, Washington and legally described in the attached Exhibit 1 ("Schoenfelder Property"). The Schoenfelders purchased their property in 1986 and, with their family, have resided on the Schoenfelder Property since December 31, 1987.

2. Plaintiffs Kenneth and Pam Bergman are husband and wife and are the owners of improved real property located at 10412 Kopachuck Drive NW and legally described in the attached Exhibit 1 ("Bergman Property"). The home on the Bergman Property was built in approximately 1965. The Bergmans purchased the property in 2004 and made it the permanent home for their family.

3. Plaintiffs Deryck and Linda Watermeyer are husband and wife and are the Trustees for the Watermeyer Living Trust, which owns the improved real property located at 10420 Kopachuck Drive NW and legally described in the attached Exhibit 1 ("Watermeyer Property"). The Watermeyers purchased the Watermeyer Property in August 1996 and, with their family, have resided at the property since that time.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

4. Plaintiffs Marylyn Lepape and Jeanne Wiener are Trustees for the Harry and Marilyn Lepape Survivor's Trust dated 8/15/12, which is the owner of the improved real property located at 10408 Kopachuck Drive NW and legally described in the attached Exhibit 1 ("Lepape Property"). Marilyn Lepape resides on the property. Marilyn Lepape, together with her now deceased husband Harry Lepape, purchased the Lepape Property in 1968. They placed a mobile home on the Lepape Property and used it as a summer residence for their family until approximately 1995, when they constructed and moved into a permanent residence on the Lepape Property in 1996.

5. Defendants Robert and Jennifer Larson are husband and wife and the owners of six tax parcels comprised of approximately 17.5 acres of real property located at 10348 Kopachuck Drive NW and depicted and legally described in the recorded survey which is Trial Exhibit 22, which legal description is incorporated by reference in these Findings of Fact ("Larson Property").

6. Defendants Larson purchased the Larson Property from third-party defendants David King, Patricia King, Barbara King and John King, who were the general partners to the King Family General Partnership; and the Larson Property was conveyed to the Larsons by statutory warranty deed recorded on January 21, 2015 under Pierce County Auditor File No. 201501210182.

7. The Schoenfelder Property, Watermeyer Property, Bergman Property and Lepape Property are all served by the same, single private asphalt road that is approximately 10 feet wide, with curvy turns and in excess of 700 feet long ("Road"). The Road crosses two of the six tax parcels comprising the Larson Property, specifically Pierce County Assessor Tax Parcel Nos. 012109-4-010 and 012116-1-013, which parcels are

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

legally described in the attached Exhibit 2 ("Encumbered Larson Parcels"). The Road has been used for ingress and egress from Kopachuck Drive to plaintiffs' properties since at least the 1960's.

8. One of the tax parcels on the Larson Property is improved with a cabin. The other five tax parcels, including the Encumbered Larson Parcels, are unenclosed and, other than the Road, undeveloped. From approximately 1953 to sometime after the mid-1990s, John and Doris King, the deceased parents of third-party defendants David, Patricia, Barbara and John King, resided in the summer months in the cabin on the Larson Property. The Kings would access their cabin from Kopachuck Drive using the northeastern portion of the Road. John King would frequently walk along the portions of the Road south and west of the cabin leading to plaintiffs' properties.

9. The Schoenfelder Property, Watermeyer Property and Bergman Property are benefitted by, and the Encumbered Larson Parcels are encumbered by an express easement recorded on August 7, 1996 under Pierce County Auditor File No. 9608070182("1996 Easement"). (Trial Ex. 10.) The 1996 Easement grants ingress and egress from Kopachuck Drive to the benefitted properties over and across the Road. Specifically the 1996 Easement grants the benefitted properties "a non-exclusive surface easement for ingress on five (5) feet on each side of the center line across the existing black-topped road." The Lepape Property is also benefitted by and the Encumbered Larson Parcels are encumbered by an express easement to use the Road as granted in the warranty deed recorded under Pierce County Auditor File No. 8105080221 and easements previously recorded under Pierce County Auditor File Nos. 1364311 and (Trial Exs. 2, 4, and 6.)

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

10. For years, the Road has been used by four families, with many vehicles going up and down the Road between plaintiffs' properties and Kopachuck Drive, including vehicles driven by family members, family member's guests, delivery and services persons and emergency service vehicles. The Lepapes have used the road since 1968; the Schoenfelders since 1987, the Watermeyers since 1986; and the Bergmans since 2004.

11. The 10-foot wide Road cannot accommodate two oncoming vehicles to pass and remain on the paved area. As a result, when two oncoming vehicles would meet on the Road, the routine practice was that one of the vehicles would pull entirely off the paved Road into one of four "turnout areas" until the other successfully passed. The four "turnout areas" are located on the Encumbered Larson Parcels, but are outside the 10-foot surface easement described in the 1996 Easement. The "turnout areas" are depicted, consistent with the turnout areas depicted on Trial Exhibits 23 and 23A , on the attached Exhibit 3 with hatched areas that are labeled A, B, Y and Z. Individually, the turnout areas are described as follows:

11.A. The turnout area labeled "Z" on Exhibit 3 is the turnout nearest Kopachuck Drive and is an area of the driveway that leads to the cabin on the Larson Property.

11.B. The turnout area labeled "A" on Exhibit 3 is a combined area on the water side of the Road and is comprised of a triangle shaped area of property and an adjacent clearing behind the cabin where Doris King used to back her car in near the kitchen to unload her groceries.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 · FACSIMILE (253) 620-6565

11.C. The turnout area labeled "B" on Exhibit 3 is located on the upland side of the Road and was commonly referred to in the testimony as the "meadow area." This is the largest and most frequently used turnout area.

11.D. The turnout area labeled "Y" on Exhibit 3 is the narrow turnout area on the waterside of the Road near the Lepape Property.

12. The above-described "turnout areas" were routinely used by the plaintiffs' four families, to allow oncoming vehicles meeting on the Road to pass. The turnout areas were used openly and notoriously by plaintiffs, or to accommodate passing by others. The road is also routinely used by plaintiffs' family members, friends of family members, milkmen, newspaper carriers, landscapers, contractors or other workmen hired by plaintiffs, Federal Express and other delivery services. The type of vehicles that have been driven into the turnout areas range from small vehicles, such as a Toyota Prius, driven by Linda Watermeyer, to large vehicles, such as a Chevrolet Suburban, driven by Kevin and Emily Schoenfelder. At times, some of plaintiffs have also pulled a boat trailer attached to their vehicle into a turnout area to allow an oncoming vehicle to pass. The typical practice of those routinely using the turnout areas would be to pull their car entirely off the Road and into the turnout area to allow the oncoming vehicle to stay on the Road and pass.

13. As a group, Plaintiffs' use of the turnout areas, as well as their successors-in-interest's use, has been continuous and uninterrupted. Use of the turnout areas has varied at times per month based on variables such as the time of day and season, but they have been used frequently by four families to accommodate a lot of vehicles going up and down the Road. Use of the turnout areas changed as the families' schedules changed. But the evidence established that each plaintiff routinely used the turnout

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

areas, either by pulling into one of the turnout areas to allow others to go by or, as in the case of Marilyn Lepape, by waiting on the Road for the oncoming vehicle to pull into a turnout area in order to continue on the Road and pass that vehicle. The turnout areas were used by the collective community residing at plaintiffs' respective properties to accommodate each community member's (and their respective guests) ingress to and egress from their respective property.

14. The testimony established that John King, Sr., upon entering the Road from Kopachuck Drive, would honk at the top of the Road and wait for an indication that either no one was on the Road or that any oncoming vehicles had moved off the Road, inferring that Mr. King knew it was not possible for two cars to pass each other on the Road and that vehicles traveling from plaintiffs' property toward Kopachuck Drive would pull off the Road to accommodate oncoming vehicles. The testimony by some of the King children established that they also knew that the Road served four families residing on plaintiffs' respective properties and that the Road was not wide enough for two meeting cars to pass each other.

15. The testimony of Dr. Kevin Schoenfelder and others established that, on one day some time before July 13, 1994, multiple large rocks suddenly appeared in the turnout area referred to as the meadow area and labeled B on Exhibit 3. The large rocks had not been there before. These large rocks were placed near the edge of the Road along the entire length of the meadow area such that they prevented plaintiffs and others from entering the meadow area with a vehicle or otherwise use the meadow area as a turnout to allow cars to pass.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

16. The circumstantial evidence established that John King Sr. placed the large rocks, or caused the large rocks to be placed in the meadow area. The plaintiffs testified that they did not place large rocks in the meadow area. Members of the King family testified that Mr. King had expressed concern about people trespassing on to the meadow area, which he watered and had retained landscapers to mow. Mr. King Sr.'s children testified they remember observing the large rocks in the meadow area and they testified that, based upon his expressed concerns, they believed their father, Mr. King Sr., either personally placed the large rocks in the meadow area or had a landscaper place the large rocks.

17. Dr. Schoenfelder immediately removed two of the large rocks, one on each end of the meadow area, to again allow access to the meadow area for use as a turnout. Upon removal of the large rocks, plaintiffs' family members continued to use this meadow area as a turnout to allow oncoming vehicles to pass. Dr. Schoenfelder subsequently used his Suburban, and others used their vehicles as well, to pound the remaining large rocks into the ground in order to make the area available for use as a turnout without damage the underside of their cars. The Court finds that plaintiffs' testimony was particularly credible on the large rocks being placed along the edge of the meadow area one day, at least two of the large rocks being immediately removed and the others pounded down. The photographs and video (Trial Exs. 14, 20.A) corroborate the testimony and more current pictures (Trial Ex. 24) corroborate that the large rocks are now either gone or can only barely be seen.

18. Dr. Schoenfelder testified that large rocks were also placed in the turnout area labeled as A on Exhibit 3 at the same time the large rocks were placed in the

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

meadow area. He testified that these rocks were not as large as the large rocks placed in the meadow area, but that they nonetheless interfered with use of this area labeled A as a turnout. Dr. Schoenfelder testified that he did not remove these rocks, as he did with the large rocks in the meadow area, but instead was able to drive his Suburban over the rocks to push them into the ground and make the area accessible as a turnout again. The Court finds quite credible Dr. Schoenfelder's testimony with regard to placement of the rocks in this area and his subsequent actions to drive the rocks into the ground so that they were no longer an impediment to access the turnout area.

19. No further efforts were taken to replace any of the large rocks. The evidence establishes that, by placing the large rocks in the turnout areas, Mr. King Sr. took a stance to block access to these two turnout areas. Dr. Schoenfelder and others effectively interfered with Mr. King Sr.'s efforts to block access to the turnout areas and their actions to clear the turnout areas for continued use were adverse to and asserted as superior to Mr. King's rights as the owner of the property upon which the turnouts are located. Thereafter plaintiffs continued regular use of the two turnout areas to allow oncoming vehicles to pass, which actions, in light of the prior placement of the large rocks, were also adverse and asserted as superior to the rights of the Kings, as property owners.

20. No large rocks were placed in the turnout areas labeled on Exhibits 3 as Y and Z and no evidence was presented of similar actions or efforts to block, or interfere with efforts to block these two turnout areas.

21. The Court finds that plaintiffs have proven by the preponderance of the evidence that, for a period of more than ten years, plaintiffs have used the turnout areas

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

labeled A and B on Exhibit 3 in a manner that is open, notorious, continuous and uninterrupted, over a uniform route, with knowledge of the owners of the Larson Property at a time they were able to enforce their rights as owners, and that plaintiffs' use of these turnout areas was adverse to the rights of the owners and interfered with the owners' use of the Encumbered Larson Parcels. The Court thus finds that plaintiffs' have a prescriptive easement over the two turnout areas labeled A and B on Exhibit 3.

22. With respect to the size of the prescriptive easement for the two turnout areas labeled A and B on Exhibit 3, the Court finds that, while the evidence establishes that plaintiffs used the full length along the road of these turnout areas, the width of the turnout area regularly used was that sufficient for a Chevrolet Suburban, which is the largest vehicle that was owned by plaintiffs and accessed the turnout areas, to fully pull all four tires of the vehicle off the Road and allow an oncoming vehicle to stay on the paved Road and pass. There are other vehicles that have traversed the road that are larger than a Suburban, such as delivery trucks or emergency services vehicles. However, the testimony was that it is plaintiffs' typical practice to pull their own vehicles off the Road and into the turnout areas to allow these larger vehicles to stay on the Road and pass. Limiting the width of the turnout areas to that sufficient to fully pull all four tires of a Chevrolet Suburban such that an oncoming vehicle of any size may stay on the paved Road and pass is consistent with the historical and regular use of the turnout areas and sufficient to accomplish the purpose of the prescriptive easement for the turnout areas, which is to allow any oncoming vehicle to stay on the paved Road and pass.

23. The Court finds that plaintiffs, pursuant to the 1996 Easement, have an express easement for a ten-foot wide paved road and that the purpose of the 1996

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
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(253) 620-6500 - FACSIMILE (253) 620-6565

Easement is to provide ingress and egress. The 1996 Easement is silent with regard to the erection of a fence or any other structure along or near the 10-foot easement area and, thus, is ambiguous in that regard. Accordingly, the Court may and did consider, in addition to the language used in the 1996 Easement, testimony and evidence regarding the situation of the property and parties, including the physical attributes of the Road and the parties' course of use of the Road to interpret the express easement consistent with its intent and to allow the full enjoyment of the purpose of the easement.

24. The evidence, which includes the testimony of plaintiffs and Fire Chief John Burgess, established that the width of the paved surface is sufficient for plaintiffs to fit all four wheels of their respective vehicles on the 10-foot wide Road, and is also sufficient for emergency vehicles, which are 8 feet six inches in width, to fit all four wheels on the Road. However, in light of the curvature of this Road that exceeds 700 feet in length, if a fence or other structure is erected at the edges of the Road, or any location closer than 2½ feet from either edge of the Road (such that the structure allows less than 15 feet of airspace), it will preclude a single vehicle traveling one way, particularly fire trucks, emergency service vehicles and other large vehicles, from maneuvering the curves of the Road and traversing the full length of the Road without interference. The compelling evidence established that such a fence or structure would materially interfere with the intended purpose of the 1996 Easement, which is to provide ingress and egress to plaintiffs' properties, and would deprive plaintiffs of full enjoyment of their express easement.

25. A restriction on the erection of a structure within 2½ feet of the easement edges does not expand the 1996 Easement for a 10-foot wide paved road. Plaintiffs' use

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

of the surface of the Larson Property is limited to the 10-foot wide easement area as provided in the 1996 Easement, with the exception of use pursuant to plaintiffs' prescriptive rights to use the two turnout areas. This limitation on the erection of physical structures within 2½ feet of the Road is, however, the minimum restriction necessary to effectuate and implement the express purpose and allow plaintiffs full enjoyment of the 1996 Easement. The Court's finding the 1996 Easement, which is silent regarding structures, necessarily restricts and precludes structures that will interfere with the purpose and preclude reasonable enjoyment of the easement is a reasonable interpretation of the 1996 Easement and consistent with its intent.

26. The testimony and evidence also establishes that a fence closer than 2 ½ feet of the outer edge of the two turnout areas labeled A and B on Exhibit 3 would also interfere with full enjoyment and the purpose of their prescriptive easement, which is to allow them to pull entirely off the road and allow oncoming vehicles of varying sizes to pass.

27. Robert Larson testified that, from the time they decided to purchase the Larson Property until December 2015, it was the Larsons' intent and plan to construct a new home and other accessory structures in and around the meadow area. Their planned new home would occupy a portion of the area encumbered by the 1996 Easement and already occupied by the Road. Thus, the 1996 Easement and Road interfered with the Larsons' development plans. Successful implementation of their development plans required that plaintiffs to each agree to relocate the Road.

28. The Larsons' stated intentions with regard to the location of a fence along the Road have changed over time. The Larsons, either through his real estate agent Rob

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

Mitchell, or directly through declarations in this lawsuit, first stated their intention to construct a fence along the edges of the 10-foot express easement. The evidence established and the Court finds that the purpose of such a fence was to leverage or intimidate the plaintiffs to agree to relocate the Road so the Larsons could pursue their development plans. The fence was basically intended to create a gauntlet for the plaintiffs to go down and served no other useful purpose.

29. The effort to use a planned fence to leverage the plaintiffs to relocate the Road was done primarily through Rob Mitchell, who was authorized by the Larsons, without any expressed guidance, instructions or limitations, to act as their agent to pursue with plaintiffs an agreed relocation of the Road. Mitchell engaged the local fire department and informed the fire department of a plan to construct a fence on the edges of the Road; and the fire department thereafter announced to plaintiffs that such a fence would impede the department's ability to provide timely emergency services. The Larsons also pursued the effort to leverage plaintiffs to relocate the road by retaining surveyor Dan Johnson in January 2015 to put metal stakes on the edge of the Road, which action prompted the filing of this lawsuit.

30. Robert Larson testified that, since tabling their original plan to construct a new home on the Larson Property in December 2015, the new plan is to occupy the cabin and sell off a significant portion of the land on the upland side of the Road. Corresponding with their new plans for the Larson Property, Larson testified that they now plan to construct a fence only on the waterside of the Road, which fence would be located one foot from the easement edge as described in the 1996 Easement. The declared purpose of the waterside fence is to create privacy for the cabin and to contain

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

their dogs. Larson further testified that they have no immediate intention to construct a fence on the upland side of the Road, though there will likely be some fence constructed on the upland side for a small animal farm area. Larson testified that, if they sell a portion of the land on the upland side of the Road, the new owners may construct a fence along or near the Road.

31. Based on the testimony of Chief Burgess and plaintiffs, the Court finds that the Larsons' revised fencing plan will interfere with the purpose and plaintiffs' full enjoyment of their express easement for ingress and egress, since it will interfere with the maneuverability of the Road for emergency vehicles and other large vehicles. But, under the circumstances of the Larsons' tabled development plans and intended plan to occupy the cabin, their revised fencing plan would serve other reasonable purposes including privacy and animal containment.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter pursuant to RCW 2.08.010. Venue is proper because the property that is the subject of this action is located in Pierce County.

Scope of Express Easements

2. Applying the applicable law to the above-stated Findings of Fact, the Court concludes that the Lepape Property is benefited by and the dominant estate holder of an express easement to use the existing Road crossing the Encumbered Larson Parcels for ingress and egress pursuant to the warranty deed recorded under Pierce County Auditor File No. 8105080221 and easements previously recorded under Pierce County Auditor File Nos. 1364311.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

3. The Court concludes that the Schoenfelder Property, Bergman Property and Watermeyer Property are all benefited by and the dominant estate holders of the 1996 Easement and the Encumbered Larson Parcels are the subservient estate to the 1996 Easement. The 1996 Easement occupies 5 feet on each side of the center line across the existing black-topped road and is for the purpose of ingress and egress to and from the Schoenfelder Property, Bergman Property and/or Watermeyer Property to Kopachuck Drive NW.

4. The 1996 Easement is unambiguous with regard to the surface area that may be occupied for purposes of accessing the Schoenfelder, Bergman and Watermeyer Properties and that said surface area is limited to 10 feet. The Court confirms its prior partial summary judgment ruling that the 1996 Easement does not include an easement to use property outside this easement area for turnouts to allow oncoming vehicles to pass.

5. The Court concludes that there is nonetheless an ambiguity in the 1996 Easement as it does not address construction of a structure that might interfere with the stated purpose of the express easement, which is for ingress and egress.

6. The Court finds the decision of the Tennessee Court of Appeals in *Carroll v. Belcher*, 1999 WL 58597 (February 9, 1999),[1] instructive on this issue. There, the court was presented with a prescriptive easement allowing the dominant estate holder to use a road on the servient estates' property with an established width, based on historical use, limited to 8 to 10 feet. The owners of the servient estate constructed a fence on the

[1] This decision is an unpublished decision of the Tennessee Court of Appeals. Tennessee Court of Appeals Rules 12 authorizes citation of its unpublished decisions. Thus, this unpublished decision may be cited in Washington courts pursuant to GR 14.1.

borders of the 8 to 10-foot wide easement. The close proximity of the fence combined with the curving attributes of the road, made it difficult to drive a vehicle the length of the road without striking the fence. The Tennessee court held that the dominant estate holder could not expand the width of the road easement based on needs of modern day vehicles. But the Tennessee court also held that the servient estate owner could not interfere with the lawful use of the easement by the dominant estate holder. The court held that placement of the fence on the border of the easement edges did materially interfere with use of the easement and enjoined the servient estate owner from erecting any structure or obstacle within two feet of the easement edges.

7. The Court concludes that, due to the length and configuration of the Road in this case, a fence closer than 2½ feet from either edge of the easement area (limiting the airspace to less than 15 feet) will preclude large vehicles, including firetrucks and other emergency vehicles from travelling the full length of the Road and, thus, materially interfere with enjoyment and use of the 1996 Easement consistent with its purpose, which is for ingress and egress. The Court therefore construes the 1996 Easement in light of its stated purpose to preclude construction of a fence closer than 2½ feet from either edge of the easement area.

8. Plaintiffs are entitled to judgment enjoining defendants Larson, or any subsequent owners of the Encumbered Larson Parcels, from constructing any above-ground structure, including a fence, closer than 2½ feet from the outer edges of the road easement as described in the 1996 Easement or closer than that described for the turnout areas subject to a prescriptive easement addressed separately below.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

9. The restriction on the construction of a structure within 2½ feet of the easement edges does not expand the width of the surface easement area. Plaintiffs' use of the surface of the Larson Property remains limited to the 10-foot wide easement area as provided in the 1996 Easement, with the exception of use pursuant to the prescriptive easement described below. If the Larsons or subsequent owners elect to construct a fence consistent with this Court's ruling, the location of the fence shall not become the basis for a prescriptive easement by the mere fact that a 2½ foot area will be between the easement edge and a fence.

Prescriptive Easement

10. Applying the applicable law to the above-stated Findings of Fact, the Court concludes that plaintiffs hold a prescriptive easement to use the turnout areas labeled A and B on Exhibit 3. Plaintiffs satisfied their burden to prove by the preponderance of the evidence that, for a period of more than ten consecutive years, plaintiffs used these turnout areas in an open and notorious manner. Plaintiffs' use was continuous and uninterrupted, as consistent with the character of use that a true owner would make of the property considering its nature and location. See *Lee v. Lozier,* 88 Wn. App. 176 (1997). Plaintiffs' use occurred over a uniform route; when faced with an oncoming vehicle, plaintiffs would pull their car off the Road and into the turnout in closest proximity. Plaintiffs' use of the turnout areas occurred with knowledge of the owners of the property at a time when they were able in law to assert and enforce their rights. See *Pedersen v. Washington State Dept. of Transportation.*, 43 Wn. App 413 (1986). Finally, plaintiffs' use of the turnout areas was adverse or hostile to the rights of the land owners.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

11. With regard to the adverse use, the Court applied *Gamboa v. Clarke*, 183 Wn.2d 38 (2015), and concludes that, because the Encumbered Larson Parcels where the turnouts are located are unenclosed and undeveloped, there was a rebuttable presumption that plaintiffs' use of the turnout areas was permissive. Based on the Court's Findings of Fact, the Court concludes that plaintiffs' overcame that presumption. The evidence established that plaintiffs interfered in some manner with the owners' use of the Encumbered Larson Parcels through removal and relocation of the large rocks placed on the two turnout areas (A and B) followed by continued use of the turnout areas to allow cars to pass on the Road.

12. The dimensions of the prescriptive easement are established by plaintiffs' use of the two turnout areas, which is the full length of the two turnout areas as they parallel the Road, but limited to the width sufficient for a Chevrolet Suburban, which is 6 feet 8 inches, to fully pull all four tires of the vehicle off the Road and allow an oncoming vehicle to stay on the paved Road and pass. The width of the turnout around areas is based upon a Chevrolet Suburban because that is the largest vehicle that was owned by plaintiffs and accessed the turnout areas. The area of the two turnout areas is depicted and more particularly described in the attached Exhibit 4.

13. Plaintiffs are entitled to a judgment quieting title to the prescriptive easement, as described in Exhibit 4, which prescriptive easement shall run with the land and benefit the Schoenfelder Property, Bergman Property, Watermeyer Property and Lepape Property as dominant estates and shall burden the Encumbered Larson Parcels as the servient estate.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

14. Plaintiffs are also entitled to judgment enjoining defendants Larson, or any subsequent owners of the Encumbered Larson Parcels, from constructing any above-ground structure, including a fence, closer than 2½ feet from the outer edges of the turnout areas described in Exhibit 4.

15. The restriction on the construction of a fence of other structure shall not become the basis for another prescriptive easement. A prescriptive easement claim will not arise based on the mere fact that a 2½ foot area may exist between the prescriptive easement edge and a fence.

RCW 7.40.030 "Spite Fence" Claim

16. The Court concludes that plaintiffs did not prove by a preponderance of the evidence all elements of an injunction claim under RCW 7.40.030. Specifically, plaintiffs did not prove the requisite element that the fence, as currently planned to be located in light of defendants Larsons' revised development plans, has no really useful or reasonable purpose because animal containment and privacy are reasonable purposes. Accordingly, judgment should be entered dismissing plaintiffs' spite fence claim.

17. Judgment shall be entered consistent with the above Findings of Fact and Conclusions of Law.

DONE IN OPEN COURT this 15th day of April, 2016.

FILED
DEPT. 15
IN OPEN COURT
APR 15 2016
By DEPUTY

HONORABLE GRETCHEN LEANDERSON

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 · FACSIMILE (253) 620-6565

Presented By:
GORDON THOMAS HONEYWELL LLP

By _____
Margaret Archer, WSBA No. 21224
Attorneys for Plaintiffs

Approved for Entry:

GOSSELIN LAW OFFICE, PLLC

By _____
Timothy Gosselin, WSBA No. 13730
Attorneys for Defendants-Third Party
Plaintiffs Larson

ADAMS & ADAMS LAW, P.S.

By _____ #13730
for Barton L. Adams, WSBA No. 11297
Attorneys for Defendants-Third Party
Plaintiffs Larson

DAVIES PEARSON P.C.

By _____
James R. Tomlinson, WSBA No. 14559
Attorneys for Third Party Defendants King

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 - FACSIMILE (253) 620-6565

EXHIBIT 1

EXHIBIT 1 – PLAINTIFFS' PROPERTY – LEGAL DESCRIPTIONS

SCHOENFELDER PROPERTY

A tract of land in Government Lot 1, Section 16, Township 21 North and Range 1 East of the Willamette Meridian described as follows:

Commencing at the northeast corner of said government Lot 1; thence south 01°53'16" west along the east line of said Lot 1 a distance of 753.31 feet to the point of beginning; thence continuing south 01°53'16" west along said east line 90.50 feet; thence north 49°01'48" west a distance of 816.88 feet to the meander line; thence north 43°13'44" east along said meander line 100.00 feet; thence south 46°46'54" east 756.46 feet to the point of beginning. Situate in Pierce County, Washington.

Together with second class tidelands, as conveyed by the State of Washington, situate in front of, adjacent to or abutting thereon,

Common Address: 10410 Kopachuck Drive NW / Tax Parcel No. 012116-1-033

BERGMAN PROPERTY

A tract of land in Government Lot 1, Section 16, Township 21 North, Range 1 East of the Willamette Meridian, in Pierce County, Washington, described as follows:

Commencing at the northeast corner of said Government Lot 1; thence South 01°54'00" West along the east line of said Lot 1 a distance of 991.10 feet; thence North 52°01'31" West 567.43 feet to the true point of beginning of this description; thence continuing along the before mentioned course North 52°01'31" west a distance of 70.39 feet; thence South 49°27'30" West for a distance of 15.00 feet; then North 40°42'19" West for a distance of 6.00 feet; thence South 49°38'19" West for a distance of 10.00 feet; thence North 48°13'22" West for a distance of 114.18 feet; thence North 34°26'47" West for a distance of 52.26 feet; thence North 52°01'31" West for a distance of 105.04 feet, more or less, to the meander line; thence North 43°13'44" East along said meander line 146.46 feet; thence South 48°58'01" east for a distance of 201.48 feet to point here after referred to as point "A"; thence continuing South 48°58'01" east for a distance of 148.22 feet; thence South 43°14'45" west for a distance of 128.61 feet to the true point of beginning and the terminus point of this description.

Except the following described parcel:

Beginning at the aforementioned point "A"; thence South 41°01'59" West for a distance of 10.00 feet; thence South 47°37'02" East for a distance of 38.76 feet; thence South 16°31'40" East for a distance of 48.81 feet; thence along a curve to the left having a radius point which bears North 53°04'07" West at a distance of 33.52 feet with a delta angle of 30°18'15" for an arc distance of 17.73 feet; thence North 06°37'38" East for a distance of 24.91 feet to a point which bears South 48°58'01" East from the point of beginning; thence

North 48°58'01" West for a distance of 60.09 feet, more or less, to the point of beginning and the terminus of this description;

Together with second class tidelands abutting thereon;

Situate in the County of Pierce, State of Washington.

(AKA New Parcel A of Record of Survey for Boundary Line Agreement recorded under Pierce County Auditor's File No. 200304095002.)

Common Address: 10412 Kopachuck Drive NW / Tax Parcel No. 012116-1-035

WATERMEYER PROPERTY

That portion of Government Lot 1, SECTION 16, TOWNSHIP 21 NORTH, RANGE 1 EAST of the W.M., in Pierce County, Washington, described as follows:

Beginning at the Southeast corner of said Government Lot 1; thence North 51°50' West a distance of 1110.55 feet to meander line on Henderson Bay; thence North 30°14' East along said meander line a distance of 74.54 feet to an angle point on the meander line; thence North 41°15' East along said meander line a distance of 141.22 feet; thence South 54°01'04" East a distance of 916.93 feet, more or less, to a point on the East line of said Government Lot 1 which is a distance of 318.14 feet bearing North 0°05'29" West of the Southeast corner of said Government Lot 1; thence South 0°05'29" East along said East line a distance of 318.14 feet to the point of beginning.

Situate in the County of Pierce, State of Washington.

Common Address: 10420 Kopachuck Drive NW / Tax Parcel No. 012116-1-012

LEPAPE PROPERTY

A tract of land in Government Lot 1, Section 16, Township 21 North, Range 1 East, W.M., in Pierce County, Washington, described as follows:

Commencing at the Northwest corner of said Government Lot 1 and thence along the meander line south 41°15' West 133.66 feet to the true point of beginning; thence South 41°15' West 200 feet; thence South 48°45' East 756.44 feet to the East line of Lot 1; thence North 00°05'29" West 266.39 feet, more or less, to a point 488.08 feet South of the North line of Government Lot 1; thence North 48°45' West 580.48 feet to the true point of beginning, in Pierce County, Washington. TOGETHER WITH tidelands abutting.

Situate in the County of Pierce, State of Washington.

Common Address: 10408 Kopachuck Drive NW / Tax Parcel No. 012116-1-028

EXHIBIT 2

EXHIBIT 2 – ENCUMBERED LARSON PARCELS - LEGAL DESCRIPTIONS

TAX PARCEL NO. 012109-4-010

Beginning at the Southwest Corner of Lot 3, Section 9, Township 21 North, Range 1 East of W.M., thence East 660 feet; thence North 59.4 feet; thence West to Meander Line; thence Southwesterly along Meander Line to Beginning:

TOGETHER WITH Second Class Tidelands adjoining lying above the line of mean low tide;

AND the North 25 feet measured along the East boundary of Lot 1, Section 16, Township 21 North, Range 1 East of W.M.,

Situate in Pierce County, Washington.

TOGETHER WITH second class tidelands adjoining, in Pierce County, Washington.

TAX PARCEL NO 012116-1-013

Part of Government Lot 1, Section 16, Township 21 North, Range 1 East of the W.M., described as follows: Commencing at the Northwest Corner of said Government Lot 1 and thence on the Meander Line South 41°15' West 33.66 feet to the TRUE POINT OF BEGINNING; thence continue South 41°15' West 100.0 feet; thence South 48°45' East 580.48 feet to the East line of Government Lot 1; thence along said East line North 00°05'29" West 463.08 feet; thence South 89°12'02" West 369.80 feet to the True Point of Beginning;

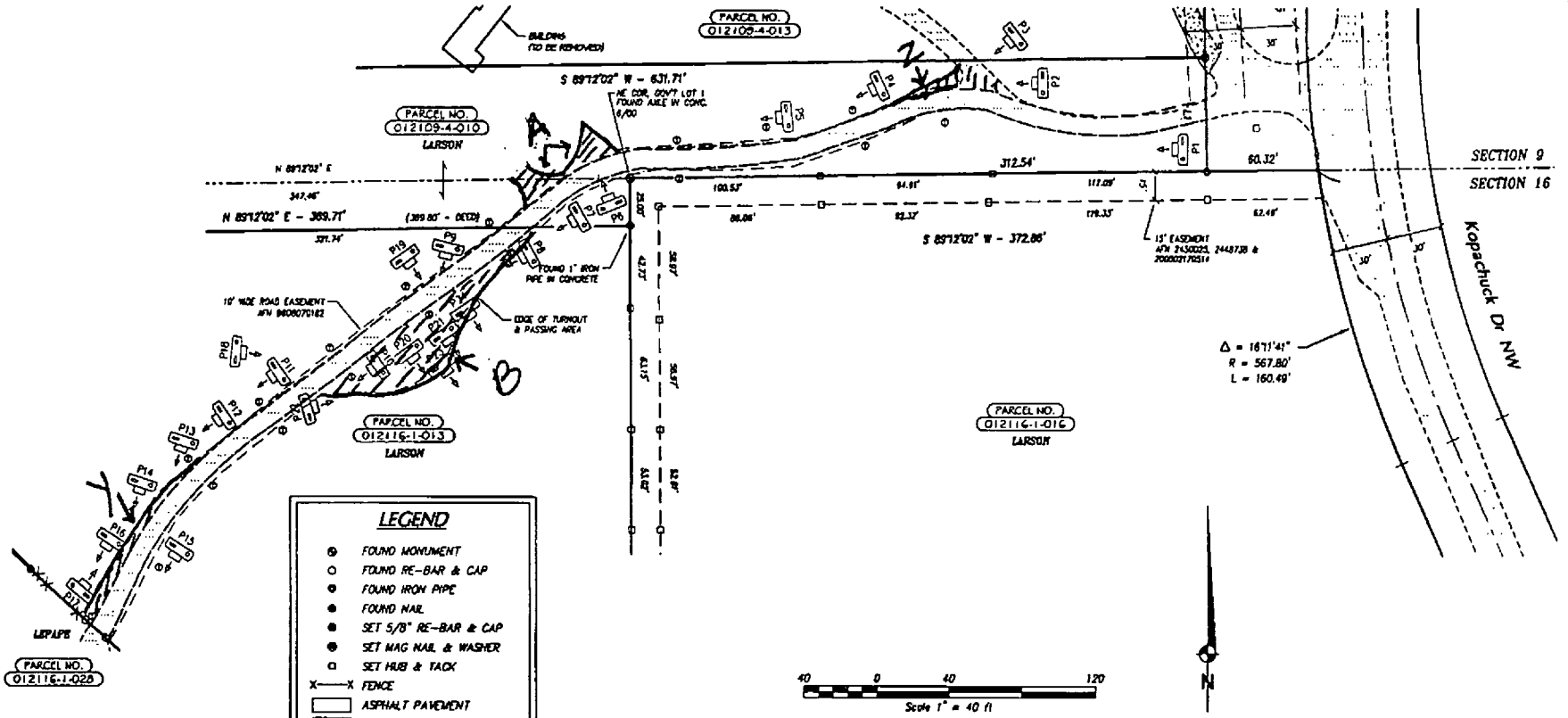
TOGETHER WITH second class tidelands adjoining, in Pierce County, Washington.

EXHIBIT 3

RECORD OF SURVEY

PIERCE COUNTY, WASHINGTON

DETAIL OF EASEMENT AFN 9608070182 AND EXISTING ASPHALT



LEGEND

- FOUND MONUMENT
- FOUND RE-BAR & CAP
- FOUND IRON PIPE
- FOUND NAIL
- SET 5/8" RE-BAR & CAP
- SET MAG NAIL & WASHER
- SET HUB & TACK
- FENCE
- ASPHALT PAVEMENT
- CONCRETE
- T-POST FENCE
- PHOTOGRAPH LOCATION, DIRECTION & NUMBER

NOTES

1. THIS SURVEY COMPLIES WITH ALL STANDARDS AND GUIDELINES OF THE "SURVEY RECORDING ACT", CHAPTER 58.09 RCW AND 332-130 WAC.
2. THIS SURVEY WAS ACCOMPLISHED USING FIELD TRAVERSE PROCEDURES.
3. A GEODIMETER MODEL 610, 3-SECOND TOTAL STATION WAS USED FOR THIS SURVEY.

BASIS OF BEARING: PIERCE COUNTY RECORD OF SURVEY, AFN 201308155006

Aspen Land Surveying LLC
at The Landing in Key Center
P.O. Box 124, Vaughn, WA 98394-0124
15510 - 92nd Street, KPN, Gig Harbor, WA 98329
(253) 303-0270 FAX (253) 303-0273

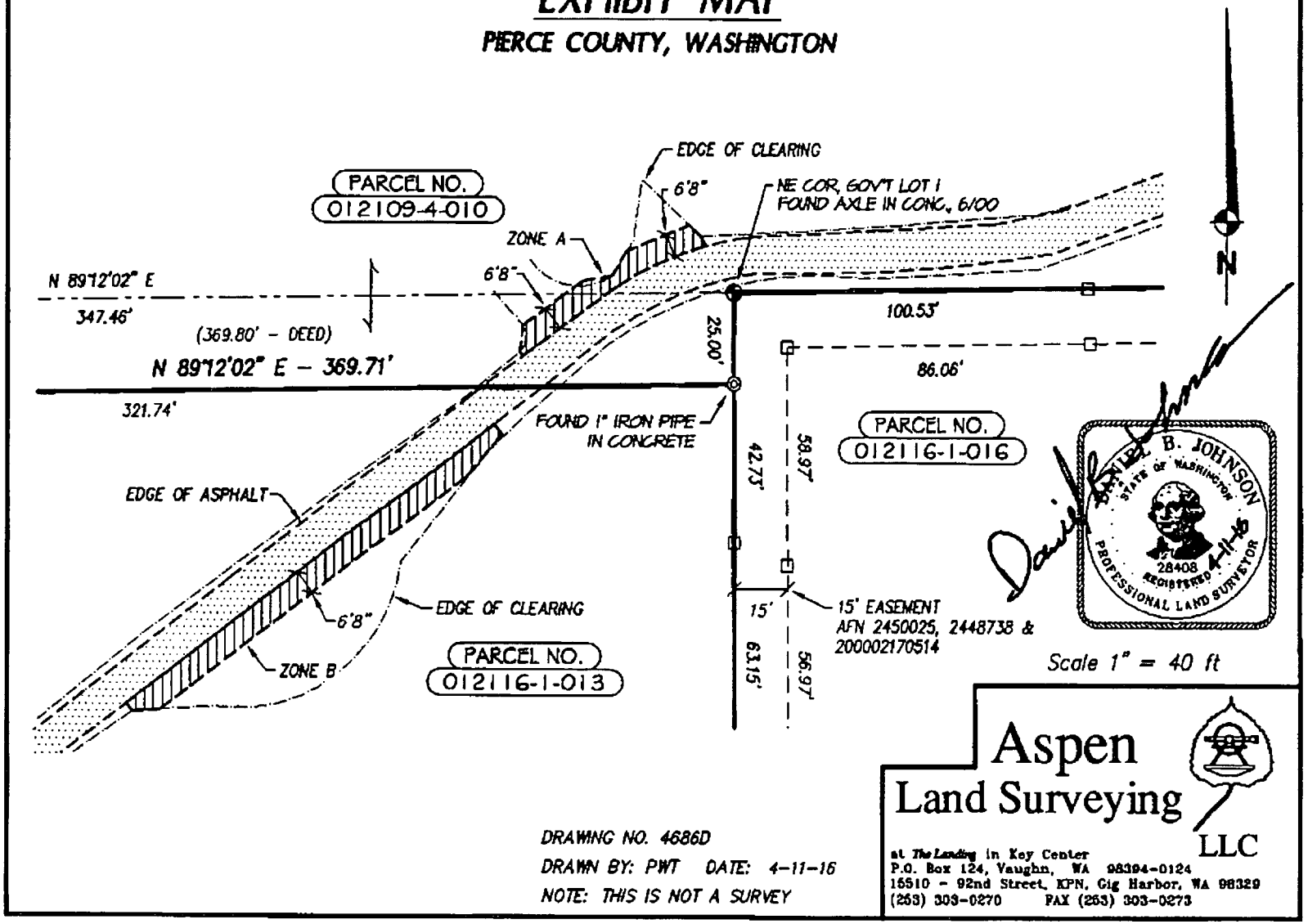
DRAWING NO. 4508 DRAWN BY: PWT DATE: 11-3-15

A PORTION OF THE SW ¼ OF THE SE ¼ SEC 9, NW ¼ AND THE NE ¼ OF THE NE ¼ SEC. 16, T 21 N, R 1 E, W.M., PIERCE COUNTY, WASHINGTON

EXHIBIT 4

EXHIBIT MAP

PIERCE COUNTY, WASHINGTON



DRAWING NO. 4686D

DRAWN BY: PWT DATE: 4-11-16

NOTE: THIS IS NOT A SURVEY

Aspen
Land Surveying LLC
at The Landing in Key Center
P.O. Box 124, Vaughn, WA 98394-0124
15510 - 92nd Street, KPN, Gig Harbor, WA 98329
(253) 303-0270 FAX (253) 303-0273

ZONE A

COMMENCING AT THE NORTHEAST CORNER, GOVERNMENT LOT 1, SECTION 16, TOWNSHIP 21 NORTH, RANGE 1 EAST, W.M., PIERCE COUNTY, WASHINGTON; THENCE NORTH 34°31'35" WEST, 14.96 FEET TO THE NORTHWESTERLY EDGE OF ASPHALT AND THE TRUE POINT OF BEGINNING;

THENCE NORTH 31°39'13" WEST, 2.92 FEET;

THENCE NORTH 46°02'17" WEST, 4.43 FEET TO LINE WHICH IS PARALLEL TO AND 6 FEET 8 INCHES DISTANT FROM THE NORTHWESTERLY EDGE OF AN ASPHALT DRIVE;

THENCE ALONG SAID LINE THE FOLLOWING FOUR COURSES;

THENCE SOUTH 67°34'43" WEST, 18.43 FEET;

THENCE SOUTH 29°20'22" WEST, 7.57 FEET;

THENCE SOUTH 79°45'09" WEST, 8.12 FEET;

THENCE SOUTH 53°04'06" WEST, 20.15 FEET;

THENCE LEAVING SAID LINE THENCE SOUTH 06°04'47" WEST, 7.29 FEET;

THENCE SOUTH 36°55'54" EAST, 1.34 FEET TO THE EDGE OF ASPHALT;

THENCE ALONG THE NORTHWESTERLY EDGE OF THE ASPHALT NORTH 53°04'06" EAST, 31.19 FEET;

THENCE CONTINUING ALONG THE EDGE OF ASPHALT NORTH 65°31'37" EAST, 27.02 FEET TO THE TRUE POINT OF BEGINNING.

ZONE B

COMMENCING AT THE NORTHEAST CORNER, GOVERNMENT LOT 1, SECTION 16, TOWNSHIP 21 NORTH, RANGE 1 EAST, W.M., PIERCE COUNTY, WASHINGTON; THENCE SOUTH 61°04'21" WEST, 74.25 FEET TO THE SOUTHEASTERLY EDGE OF ASPHALT AND THE TRUE POINT OF BEGINNING;

THENCE SOUTH 53°29'46" WEST, 126.18 FEET ALONG THE EDGE OF ASPHALT;

THENCE SOUTH 34°01'38" EAST, 2.68 FEET;

THENCE NORTH 86°00'14" EAST, 7.82 FEET TO LINE WHICH IS PARALLEL TO AND 6 FEET 8 INCHES DISTANT FROM THE SOUTHEASTERLY EDGE OF AN ASPHALT DRIVE;

THENCE NORTH 53°29'46" EAST, 104.73 FEET;

THENCE NORTH 40°52'08" EAST, 15.44 FEET;

THENCE NORTH 38°03'30" WEST, 3.51 FEET TO THE TRUE POINT OF BEGINNING.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

KEVIN SCHOENFELDER and EMILY SCHOENFELDER, husband and wife, et al, Respondents, vs. ROBERT LARSON and JENNIFER LARSON, husband and wife, Appellants, vs. DAVID KING and JANE DOE KING, et al, Third Party Defendants.	NO. 48885-0-II CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 4th day of November, 2016, I did place with the United States Postal Service, first class postage paid, and did email the Brief of Appellants and this Certificate to the following:

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

Margaret Y. Archer
GORDON THOMAS
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6550
marcher@gth-law.com

James R. Tomlinson
DAVIES PEARSON
920 Fawcett Ave.
P.O. Box 1657
Tacoma, WA 98401-1657
(253) 620-1500
jtomlinson@dpearson.com

I declare and state under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 4th day of November, 2016, at Tacoma, Washington.

By : _____
TIMOTHY R. GOSSELIN

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028